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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 994

SEYMOUR POLLACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that this Honorable Court grant a rehearing of its Order of February 24, 1970 denying the Petition for a Writ of Certiorari and that a Writ of Certiorari issue reversing the decision and judgment below of the United States Court of Appeals for the Fifth Circuit.

BRIEF AND DISTINCT STATEMENT OF GROUNDS

Substantial grounds available to Petitioner have not been previously presented fully and other circumstances have occurred which warrant the filing of this Petition for Rehearing under Rule 58 of this Court.

Several recent decisions of this Court which have not been discussed in the Petition for Writ of Certiorari or in the Reply Brief have been decided by this Court which support Petitioner's contention that Rule 18 of the court below providing for a summary disposition of appeals without argument should be reviewed. In *Commonwealth Coat Corp. v. Continental Gas Co.*, 393 U.S. 145, 89 S. Ct. 337 (1968), this Court held (pp. 150, 340) "Any tribunal * * * permitted to try cases and controversies * * * not only must be unbiased but also must avoid even the appearance of bias" reaffirming *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

In *Commonwealth* and *Tumey* this Court stated both the Constitution and statutory requirements provide that all trials must be "impartial." In reversing a summary proceeding finding an attorney guilty of contempt, this principle was enunciated in *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, wherein this Court held in reversing such summary proceeding that it did not "satisfy the appearance of justice."

Private, in chambers, and summary disposition of criminal appeals which are matters of right in the Court of Appeals, wherein there should be a hearing on the merits in the court first charged with conducting a hearing on the merits of the trial, is a denial of due process of law, is unfair, and does not "satisfy" and destroys all "appearance of justice."

Petitioner set forth in his Petition that Rule 18 (App. B, p. B4) of the court below, permitting summary proceedings without oral argument, is unconstitutional and is contrary

to the Federal Rules of Appellate Procedure of this Court, particularly Appellate Rules 2, 3, 34 and 47 (pp. 6-8). (App. B, pp., B3, 4). Rule 34 of the Appellate Rules of this Court requires oral argument, sets a time for oral argument and provides that oral argument can be dispensed with only "by agreement of the parties," and even when such an agreement is reached a Court of Appeals "may direct that the case may be argued." The summary provisions of Rule 18 providing for sua sponte in chambers and summary dispositions of appeals in criminal cases without oral argument is in direct conflict with Appellate Rules 34 and 47 of this Court.

Petitioner pointed out in his Petition (pp. 6-8) and in his Reply Brief (pp. 8-11) that Rule 18 provides for the type of summary proceeding characterized by this Court as a Star Chamber proceeding in England, and such a summary proceeding in Chambers is unconstitutional and illegal because it deprives the citizen of his liberty without the charge being fairly made and fairly tried in a public tribunal, citing *In Re Oliver*, 333 U.S. 257, 266-270, 278; 68 S. Ct. 499, 504-506, 510 and *Chambers v. Florida*, 309 U.S. 227, 236, 237, 60 S. Ct. 472, 477.

In *Rodriquez v. United States*, 395 U.S. 327, 89 S. Ct. 1715 (1969) this Court set aside the requirement of the Ninth Circuit that before indigent appellants could go forward with an appeal, such appellants would have to "show some likelihood of success on appeal" and its holding that failing to show such likelihood the "denial of the right of appeal as a species of harmless error" stating (pp. 329-330, 1717):

> "As this Court has noted before, 'present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right.' *Coppedge v. United States*, 369 U.S. 438, 441, 82 S. Ct. 917, 919, 8 L. Ed. 2d 21 (1962). The Ninth Circuit seems to require an applicant under 28 U.S.C. Sec. 2255 to show more

> than a simple deprivation of this right before relief can be accorded. It also requires him to show some likelihood of success on appeal; if the applicant is unlikely to succeed, the Ninth Circuit would characterize any denial of the right to appeal as a species of harmless error. We cannot subscribe to this approach."

This Court further held (pp. 332, 1718) that the applications of these holdings of the Ninth Circuit "effectively deprive petitioner of his right to appeal."

Rule 18 in providing for summary disposition in chambers, without oral argument and participation by counsel should not be permitted to stand, as it effectively denied Petitioner of a fair and public hearing on his appeal in "the Court first charged with the supervision of the trial court." *Coppedge v. United States,* 369 U.S. 438, 441, 453, 82 S. Ct. 917, 919, 925 (1962).

Rule 18 effectively bars an open and public appeal, contrary to Appellate Rule 34 of this Court. Rule 18, therefore, conflicts with the ruling in *Liles v. South Carolina Department of Corrections,* 414 F.2d 612 (C.A. 4, 1969) because it denies Petitioner the type of hearing on appeal now provided by statute and by the Federal Rules of Appellate Procedure. Thus, the Court of Appeals in *Liles* in reversing the district court and in granting an appeal in forma pauperis, held (p. 614):

> "Neither by the statutes of the United States nor the Federal Rules of Appellate Procedure is the district court given the power to deny review by this court of a case in which an appeal as of right is assured.
>
> * * *
>
> This will insure that the right of appeal will not be lost or denied because of a prisoner's indigence or his ignorance of proper appellate procedures."

The summary disposition without oral argument of Petitioner's appeal in Chambers and without an oral argument

seems a step backward and into the type of "Star Chamber" proceedings condemned by the Magna Carta (1641), the Fifth and Sixth Amendments to the Constitution (1791), Appellate Rule 34 of this Court and by this Court. This Court should exercise its power of supervision and correction, should review Rule 18 of the court below and hold Rule 18 to be unconstitutional and contrary to law as applied in Petitioner's case. Rule 18 constitutes such a departure from the recognized and proper conduct of appeals in Federal Courts as to call for the exercise of this Court's powers of supervision and correction.

CONCLUSION AND PRAYER

Petitioner prays that this Honorable Court grant this Petition for Rehearing, and, on rehearing, issue a Writ of Certiorari reversing the judgment below.

Respectfully submitted.

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Hans A. Nathan
Warren E. Magee

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Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Warren E. Magee
Counsel for Petitioner

Dated March 17, 1970